

## Faulk, Camilla

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To: Sullins, Nan  
Subject: RE: CrR 4.11

-----Original Message-----

From: Darvas, Andrea [mailto:Andrea.Darvas@kingcounty.gov]  
Sent: Wednesday, May 04, 2011 1:36 PM  
To: AOC DL - Rules Comments  
Subject: CrR 4.11

Dear Justices:

I write in my individual capacity to urge the Court to adopt CrR 4.11.

The credibility of a single witness (frequently the alleged crime victim) is often the only evidence by which a defendant is convicted or acquitted. Evidence that such a witness gave a substantially different version of events before trial may be critical.

Defense counsel have a right and a duty to interview material witnesses. The reason for this right is that defense counsel cannot be prepared and effective without knowing what witnesses will testify to at trial. State's witnesses, including alleged crime victims, sometimes change their stories in material ways. In civil cases (where a party's liberty is not at stake), counsel have a right to note depositions of witnesses in order to tie down their testimony. This right does not extend to criminal cases, and even if it did, depositions would likely add substantial expense to investigation and administration of criminal cases.

Historically, defense counsel have dealt with this problem by bringing along an investigator to take notes during the defense counsel's interview with State's witnesses. The investigator could then be called to testify for impeachment purposes if a witness at trial gave testimony that was materially different than what the witness had disclosed during the defense interview. However, this process is unnecessarily expensive and cumbersome. Confronting a trial witness with his or her own words by playing a portion of a recorded interview, or by showing the witness a transcript, is both more effective for impeachment and more fair as well, since it has little risk of degenerating into a debate over what the witness actually said, or whether an investigator's notes are accurate. It also avoids the problem of asking a jury to decide whether it finds a state witness or an defense investigator the more credible as a witness, as well as problems posed by ER 413, given that defendants do not call witnesses (even impeachment witnesses) until after the State has rested its case.

Moreover, in this era of shrinking budgets, and in recognition that the vast majority of criminal defendants are represented by publicly funded defense counsel, requiring defense counsel to bring along another person for the sole purpose of taking notes at a witness interview so that the investigator can offer impeachment testimony if the witness changes his/her testimony at trial simply cannot be supported as a defensible use of scarce public funds.

With regard to the time and place for witness interviews, there is nothing in the proposed rule that changes current practice, which permits defense counsel to approach potential witnesses for interview at times and places of defense counsel's choosing. The witness is, of course, free to decline to be interviewed at a time or place that is inconvenient for the witness, and CrR 4.11 does not change this. Nor does the proposed rule change the right of the court to put limitations on use or abuse of the right to record interviews with witnesses.

There is nothing in the proposed rule that specifically authorizes pro se defendants to harass witnesses. To the extent that a pro se defendant already has the right to interview witnesses, the rule does nothing to expand that right (other than giving a right to openly record the interview). Besides, the rule specifically states only that "Counsel for any party, or an employee or agent of counsel's office, may conduct witness interviews by openly using an audio recording device or other means of verbatim audio recording, including a court reporter". The rule does not explicitly include pro se defendants. Defendants who have been accused of crimes of assault, domestic violence, or sex offenses generally have pre-trial no contact orders that prevent them from contacting the alleged crime victim(s) directly, which provides additional safeguards against harassment by pro se defendants against crime victims.

With regard to the expense of a transcript, the proposed rule states only that any party may order a transcript at his or her own expense. It does not appear to impose the cost of obtaining a copy of the transcript on the witness. Furthermore, to the extent that this is a serious objection, a sentence could be added to the proposed rule that would require a party who obtains a recording and/or a transcript to provide a copy to the witness and to the opposing party.

In closing, I would note that the WSBA Board of Governors voted to recommend adoption of CrR 4.11 after due consideration of the numerous objections to the rule. I urge the Court to approve this rule in the interests of justice.

Respectfully,

Judge Andrea Darvas  
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